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No. 219

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION; NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board concluded that 41 coal mining companies were part of an appropriate multi-employer bargaining unit and that their refusal to bargain with petitioner Union, the certified representative of the employees in that unit, violated Section 8(a)(5) and (1) of the National Labor Relations Act (Pet. App. A40-A83). The Board ordered the companies, *inter alia*, to bargain, on request, with the Union

(Pet. App. A81). The factual findings underlying the Board's decision may be summarized as follows:

In September 1962, 41 companies engaged in coal mining in three counties in Southeastern Tennessee formed the Sewanee Coal Operators Association (Sewanee) to represent them for collective bargaining purposes. Sewanee negotiated with the Union on a multi-employer basis between September 1962 and January 1963; four bargaining sessions were held, but no agreement was reached. In late December 1962, the employees represented by the Union struck the members of Sewanee, causing the members' mines to shut down. That strike continues (Pet. App. A48-A49).

In February 1963, the Union petitioned the Board for a certification as the representative of the employees of the members of Sewanee in a multi-employer unit. The Board found the multi-employer unit appropriate, and an election was held in October 1963 (Pet. App. A84-A92, A94). In a supplemental Board proceeding designed to resolve issues arising from the election, the evidence showed that Sewanee had been dissolved and that additional mine operators had ceased business after the Board had made its unit determination and had conducted the election. The Board found that the continuing strike by the Union was responsible for the closing of a number of the mines; that the dissolution of Sewanee was an attempt to withdraw from a multi-employer bargaining unit at an inappropriate time; that some former members of Sewanee continued to operate

during the strike; and that others would probably resume operations after the conclusion of the strike. Accordingly, the Board concluded that the multi-employer unit continued to be appropriate and, since the Union had received a majority of the ballots cast in the election, it certified the Union as the representative of the production and maintenance employees of the former members of Sewanee (Pet. App. A107-A123, A52). Following the certification, the former Sewanee members refused to bargain with the Union, giving rise to the present proceeding.

2. The court of appeals (Judge Edwards dissenting) declined to enforce the Board's order (Pet. App. A1-A39). The court found that, under the particular circumstances of this case, events before and after the election of October 1963 "destroyed the consensuality needed to justify the creation and * * * continuation of a 'multi-employer unit'" (Pet. App. A20). The court further found that, "by the time the certification of the UMW as the exclusive bargaining agent of [the employees of the former members of Sewanee] was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW" (*ibid.*).

3. Petitioner contends that the court of appeals' decision conflicts with cases holding that members of a multi-employer unit may not withdraw from the unit after collective bargaining has commenced (Pet. 11). The court of appeals accepted that principle, however, but correctly noted that in those cases the issue was presented by individual members' ef-

forts to withdraw from ongoing multi-employer units. Here, the court found, there was initial doubt whether all the employers had unambiguously committed themselves to bargain through Sewanee, and there were no individual withdrawals from the unit; rather, the unit itself was "completely destroyed," and, after the strike commenced in December 1962, most of the employer members of the unit went out of business (Pet. App. A19, A3).

In reaching these conclusions, the court viewed the evidence differently than had the Board. The Board had noted that most of the mine companies had ceased business, but concluded that many of them could be expected to resume operations once the strike was over. Although the Board disagrees with the court's assessment of the evidence, it believes that, on that assessment, there is no conflict among the circuits and only an evidentiary issue is presented.

In view of the above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1970.

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